(3)

No. 06-195

File
9/6/06

IN THE

SUPREME COURT OF THE UNITED STATES

SAINT MATTHEW'S CHURCHES, INC., *et al.*,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA and VALERIJA KACHAVOS,

Respondents

On Petition For A Writ of Certiorari To The United States Court of Appeal For The Ninth Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

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I. INTRODUCTION

The within RICO action is absolutely not an "ecclesiastical" dispute. The Complaint is replete with factual allegations of specific acts of mail fraud and wire fraud. None of the predicate acts initiate any "religious" or spiritual interpretations, which is why the District Court denied Petitioners' Motions and the 9th Circuit denied the Petition for the Writ of Mandamus, following briefing on a *dilatory* motion filed by Petitioners. (Other frivolous delay motions had already been denied by the District Court.)

As a neutral and generally applicable law, RICO does not violate the First Amendment. There is no case law or legal precedent to support Petitioners' contentions that RICO is somehow unconstitutional when applied to predicate acts of mail fraud involving "conduct," to be distinguished from religious beliefs. Petitioners appear to be asking this Court for some kind of "denominational protection" that will allow them to solicit funds using the United States Mail for their racketeering enterprises because they claim their malfeasance was done for "religious reasons."

II. STATEMENT OF CASE

Respondent, Valerija Kachavos, filed the instant RICO action against Petitioners on October 4, 2005, in the United States District Court for the Central District of California, alleging violations of RICO, conspiracy to violate RICO,

aiding and abetting RICO activities involving 1.7 million (1,700,00) acts of mail fraud and over one (1,000,000) million acts of wire fraud. Ms. Kachavos also alleges violations of the Hobbs Act (18 U.S.C. 1951), and the Violent Crimes in Aid of Racketeering Activities Act (18 U.S.C. 1959). She pleaded State of California pendant claims for Common Law Fraud, Defamation, and Intentional Infliction of Emotional Distress.

Factually, Ms. Kachavos alleges that the individually named Petitioners conducted a multi-million dollar direct mail scheme targeting the impoverished and illiterate using various aliases, including "Saint Matthew's Churches" (a purported non-profit) in order to launder funds to their "profit making" businesses. The Complaint contains specific factual allegations as to how the Petitioners fraudulently induced the unwitting Respondent into a harmful employment situation (by directly involving her in the Criminal Enterprise) which has caused permanent damage to her professional reputation, rendering her unemployable in her profession, with a loss of legitimate business opportunities. Further, Ms. Kachavos alleges that Petitio rs threatened her with physical violence to prevent her from exposing their unlawful behavior to Federal authorities, including the fact that this so-called "church" sued her in State Court claiming that she stole their "trade secrets."

III. ARGUMENT

A. STATUTES INVOLVED: STANDARD OF REVIEW

1. United States Constitution, Amendment One

This Court has consistently held that an individual's religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the Government is free to regulate. As early as 1878, in *Reynolds v. United States,* (98 U.S. 145), the Supreme Court established the principle that while the right to believe is absolute, the right to act is not. The Court ruled that a segment of society could not in the name of religious freedom under the First Amendment, avoid compliance with society's law prohibiting polygamy:

> " Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinion, they may with practices.....Can a man excuse his practices to the contrary because of religious beliefs? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 166-167.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or proscribes) conduct that his religion prescribes (or proscribes). (*United States v. Lee*, 455 U.S. 252 [1982] (the state may justify a limitation on religious freedom by showing that it is essential to accomplish an overriding governmental interest.) See also:

Wisconsin v. Yoder, 406 U.S. 205 [1972] (compulsory school attendance); *Sherbert v. Verner*, 374 U.S. 398 [1963] (denial of unemployment benefits to applicant who refused to accept work requiring her to violate the Sabbath); *Gillette v. United States*, 401 U.S. 437 [1971] (sustained military Selective Service System); *Thomas v. Review Board*, 450 U.S. 707 [1981] (denial of unemployment benefits to applicant whose religion forbade him to fabricate weapons); *Prince v. Massachusetts*, 321 U.S. 158 [1944, (mother could be prosecuted under child labor laws for using her children to dispense religious literature in the streets); *Braunfeld v. Brown*, 366 U.S. 599 [1961] (upheld Sunday-closing laws); *Hernandez v. Commissioner*, 490 U.S. 680 [1989] (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

As Justice Frankfurter stated in *Minersville School District Board of Education v. Gobitis,* 310 U.S. 586 (1940):

> "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."

2. The Racketeering Influenced and Corrupt Organizations Act (RICO)

RICO was enacted as Title IX of the Organized Crime Control Act (OCCA) of 1970 (P.L. No. 91-452, 901, 84 Stat. 922, 942 [1970]; codified as amended, 18 U.S.C. 1961-1968 [2000].) The statute provides enhanced criminal and civil remedies against any violator who uses or abuses an enterprise through a pattern of racketeering activity. Congress passed RICO in an effort "to provide new weapons of unprecedented scope for an assault on organized crime and its economic roots." (*Russello v. United States*, 464 U.S. 16 [1983]) "By including a private right of action in RICO, Congress intended to bring the pressure of private attorney generals on a serious national problem for which prosecutorial resources were deemed inadequate." (*Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 [1992].)

Section 904(a), Stat. 947 of the OCCA directs that "the provisions of this Title shall be liberally construed to effectuate its remedial purposes." (*Russello*, supra at 27.) " RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to be liberally construed to effectuate its remedial purposes." (*Sedima v. Imrex*, 473 U.S. 479 [1985].)

Although 18 U.S.C. 1964(c) creates a civil cause of action, the racketeering activity giving rise to RICO liability must be criminal in nature. In *H.J. Inc. v.*

Northwestern Bell Tel. Co., (294 U.S. 229 [1989]), this Court noted that predicate acts must (1) pose a threat of continued criminal activity; (2) Congress was concerned with long term criminal conduct; and, (3) Congress drafted RICO broadly enough to encompass a wide range of criminal activity. To be criminal, conduct must be committed with the *mens rea* appropriate to the offense.

3. Mail Fraud

Pursuant to 18 U.S.C 1341, mail fraud involves (1) the existence of a scheme to defraud, and (2) using or causing the use of the mails in furtherance of the scheme. Section 1341 covers "those limited instances in which the use of the mails is part of the fraud." (*Kann v. United States*, 323 U.S. 88 [1944].) The relationship between the actual mailing and the fraudulent scheme is close enough if the defendant knows, "that the use of the mails will follow in the ordinary course of business, or where such use can be reasonably foreseen, even though not actually intended." (*Pereira v. Hubbard*, 347 U.S. 1 [1954].) In other words, mailings that are "incident to an essential part of the scheme or fraud" or "a step in the plot" fall under the mail fraud statute. (*Schmuck v. United States*, 489 U.S. 705 [1989].)

B. SAINT MATTHEW'S CHURCHES AND IT'S "ALIAS" ORGANIZATIONS ARE ENTERPRISES UNDER RICO

1. RICO Is a Neutral, Generally Applicable Law, and Therefore Does Not Violate the First Amendment

The free exercise clause of the First Amendment prohibits legislation of religious beliefs. Petitioners erroneously argue that Congress lacks any authority to legislate with respect to any religious activity or conduct. In *Cantwell v. Connecticut* (310 U.S. 296 [1940]), this Court stated:

> " Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury."

Statutes are not invalid simply because they affect the operation of a religious organization. (*Thomas*, supra at 707.) There is no question that laws may greatly burden religious conduct. A neutral, generally applicable law may be applied to religious conduct. Fundamentalists in Tennessee may not handle snakes in Church (*State v. Massy*, 229 N.C. 734 S.E. 2d 179, appeal dismissed, 336 U.S. 942[1949]). Orthodox Jews may not wear yarmulkes in the Armed Forces (*Goldman v. Weinberger*, 474 U.S. 503[1986]). Mormons in Utah may not legally practice polygamy (*Reynolds*, supra at 166-167). A law is "neutral" if it has a secular purpose that the government is free to regulate and neither advances

nor inhibits religion (*Jimmy Swaggart Ministries v. Board of Education*, 493 U.S. 378 [1990]). A law is "generally applicable" if it applies neutrally to all members of society (*Swaggart*, supra at 391-392).

In *Lemon v. Kurtzman* (403 U.S. 602 [1971]), this Court articulated a three-part test to support a finding that a statute does not violate the Establishment Clause. First, the statute must have a secular purpose. Second, its principal or primary effect must be one that neither advances or inhibits religion. Third, the statute must not foster an excessive government entanglement with religion.

RICO has an obvious secular legislative purpose to eliminate racketeering activity. Its primary effect neither advances or inhibits religion. The question therefore, is whether applying RICO in the circumstances of this case would foster an impermissible government entanglement with religious doctrine. The answer is clearly, "No!" The issues in this case are whether Petitioners involved Respondent in a racketeering enterprise that caused damage to her business and property. None of the pleaded Claims would require the Court to evaluate religious doctrine or the reasonableness of the "religious practices." Indeed, Petitioners have failed to state exactly what religious practices they want this Court to protect.

Petitioners' use of the mail to fraudulently induce unsuspecting donors to send them money does not require any spiritual or ecclesiastical inquiry.

Petitioners use the United States Mail to send out millions of letters each year soliciting money for "prayer requests." Petitioners target the impoverished, the illiterate and the elderly who are vulnerable and easily victimized. The unsuspecting donors complete the "prayer request" forms sent to them, listing their needs (i.e., better health for themselves and their family members, money a new roof, education for their children, food, etc.,) and return the requests to Petitioners with a money offering, believing that the purported "ministers" at SMC are going to pray on their behalf. Petitioners deposit the funds in their bank accounts and live opulent lifestyles on the donations. Then they incinerate the "prayer requests." (The prayer requests are incinerated so there will be no record for the Internal Revenue Service.) There is the need for an inquiry into religious doctrine or a spiritual interpretation in this scenario?

Respondent respectfully submits the following analogy to the Court. The "Maryknoll" Missionary Fathers solicit funds via the United States Mail, offering to conduct "Masses" for the sick, elderly or those souls who have passed away. The Fathers send "Mass cards" to those who donate. The difference between the Maryknolls and Petitioners is that the priests actually do what they promise---they conduct a Mass and pray. Assuming arguendo, that the Maryknolls did not conduct the Masses, and if subsequently investigated for mail fraud, would that require an inquiry into Catholic doctrine? No, it would not be an intrusion into

Catholicism by the Government, as it would be an inquiry into criminal conduct.

Petitioners misrepresent to this Court that Ms. Kachavos' assertion that SMC does not receive the addresses of prospective donors through divine intervention is false, and goes to the truth or validity of religious beliefs (Petition, pages 3-4):

> " She asserted RICO violations, but all of her allegations involved the claimed falsity of the religious doctrines and beliefs of Saint Matthew's Churches. She alleged that he defendants fraudulently claimed that God put the people in the church ministry in touch with one another. She also claimed that the defendants fraudulently represented that their Covenant Prayer Cup was sent at the direction of the Holy Spirit. Through false representations, it was claimed, the defendants engaged in wire fraud."

Petitioner Milton Ray McElrath Senior, has already admitted in the Los Angeles Superior Court (*Saint Matthew's Churches v. Kachavos*) that divine inspiration was not the source of the names and addresses on SMC's "membership list." SMC filed a lawsuit in the Superior Court alleging that Ms. Kachavos had stolen its "church membership list" and that said list was a trade secret. Ms. Kachavos asserts that said action is a SLAPP suit (Strategic Lawsuit Against Public Participation) filed to prevent her from turning over SMC's "membership list" (which is really a computerized donor analysis of mail solicitation responses) to Federal authorities (the I.R.S. and United States Postal Inspector), and to destroy her credibility should she later be called upon to testify

against Petitioners. During trial, McElrath testified that the names and addresses on SMC's "membership list" had been "rented" from public direct mail vendors, after SMC acquired United States Census Bureau data to target poor inner city and rural neighborhoods for solicitations. Essentially, in order to win the SLAPP suit, McElrath had to admit under oath, there was no divine intervention in obtaining the names and addresses of potential donors, but rather a very non-devine computer data list from a Government agency. It is clear that Petitioners have different arguments for different Courts, and the veracity of said arguments is of little concern to them. Currently Petitioners are before the State of California Court of Appeal, Second Appellate Division arguing that SMC's "membership list" is a "trade secret," and they are before this Court arguing that God is in the trade secrets business.

Further, Petitioners misstate that Ms. Kachavos has alleged their misrepresentations of who gave them the prospective donors names constitutes "wire fraud." Respondent has alleged that Petitioners engaged in commercial inter-state wire transactions of donors' funds which constitute predicate acts of wire fraud in furtherance of their racketeering activities.

Petitioners reliance on *United States v. Ballard* (322 U.S. 78 [1944]) is misplaced. *Ballard* is factually distinguishable from the instant action. Ms. Kachavos has alleged that Petitioners solicited money via the United States Mail

for "prayer requests." Unsuspecting donors sent Petitioners money, expecting said requests to be prayed over. Instead of praying over the "prayer requests" as promised, Petitioners incinerated them. Petitioners' predicate acts of mail fraud are not based in religious doctrine or beliefs. The donors simply did not get what they paid for.

Like the Ballards, "Reverend" Ewing's tent revivals involve claims of supernatural powers. He has raised people from the dead and cured all kinds of illnesses. Respondent is not questioning anyone's right to believe in "Reverend" Ewing's "divine powers." If people want to believe "Reverend" Ewing can raise people from the dead, that is their right under the First Amendment. However, when "Reverend" Ewing uses the mail to fleece innocent victims, then it becomes a matter of conduct, not belief. As this Court stated in *Ballard*, " Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. (*Id.* at 303.)

2. Petitioners' Assertions That Their Criminal Enterprise Is a Church With a Creed Which Cannot Be Disturbed By This Court Is a Red Herring to Obfuscate Their Predicate Acts of Mail Fraud.

First, and foremost, Saint Matthew's Churches (also known as Reverend Ewing's Evangelistic Ministries, Church of Compassion, Church and Bible Study in the Home By Mail, and Saint Matthew's Publishing) is not a "church." It is a

non-profit organization pursuant to Internal Revenue Code (I.R.C.) 26 U.S.C. 170 (c)(2)(B) which states it is:

> "organized and operated for religious, charitable, scientific, literary or educational purposes, or to foster national or international amateur sports competitions, or for the prevention of cruelty to children or animals."

Essentially, SMC has the same tax designation as the Special Olympics, the Young Mens' Christian Association (YMCA), and the Society for Prevention of Cruelty to Animals (SPCA). The SPCA and Special Olympics cannot commit mail fraud and then hide behind the First Amendment, and neither can Petitioners.

Further, it should be noted that the Internal Revenue Service has not granted SMC "church" status under I.R.C. 26 U.S.C. 170 (b)(1)(A)(i). The lack of "church" designation is of great import because the Government denies organizations "church" status that do not have a cognizable "creed!" SMC's alias and predecessor organizations were not granted "church" status either.

Respondent respectfully requests that this Court review prior decisions by the Ninth Circuit and D.C. Circuit wherein both Courts have determined that Petitioners' other enterprises were not "churches." (*Church by Mail v. Commissioner of the Internal Revenue*, 765 F. 2d 187 [9th Circuit 1985] and *Church by Mail v. The United States*, on review from the Tax Court and Ninth Circuit, WL 13356, cv-87-0754-LFO [D.C. Circuit 1989].)

3. Respondent Has Standing to Sue Under RICO

Ms. Kachavos has invoked Federal jurisdiction, therefore she must establish the "irreducible constitutional minimum of standing." (*Lujan v. Defenders of Wildlife*, 504 U.S. 555[1992].) Respondent has alleged a concrete, actual injury in lost wages. Ms. Kachavos' loss of income was directly and proximately caused by Petitioner's racketeering activity. The award of monetary damages will redress the injury of lost wages and damage to her professional career.

Petitioners erroneously argue that Ms. Kachavos' allegations of lost employment and wages under 18 U.S.C. (a) and 18 U.S.C. (b) are for wrongful termination. Respondent alleged that Petitioners employed her using income derived from their racketeering activity to facilitate their ongoing criminal enterprise. Petitioners fraudulently induced Ms. Kachavos into harmful employment, which ultimately left her unemployable.

Further, Ms. Kachavos alleged that she detrimentally relied on Petitioners' fraudulent representations as to the legitimacy of their "churches and charities" which caused her to forego other legitimate career opportunities.

Loss of employment benefits, loss of business opportunities and damage to one's professional reputation have all been held to constitute cognizable injuries to business and property for purposes of RICO, so long as the injuries were proximately caused by racketeering activity. See: *Khurana v. Innovative Health*

Care Systems. Inc. (130 F. 3d 143 [5th Circuit 1997]); *Sadighi v. Daghighfekr* (36 F. Supp. 2d 279 [D.S.C. 1999]); *Guerro v. Gates* (110 Supp. 2d 1287 [C.D.Cal. 2000]); *Hunt v. Weatherbee* (626 F. Supp. 1097 [D. Mass. 1986]); *NOW v. Scheidler* (510 U.S. 249 [1994]).

The Ninth Circuit Court of Appeals, *en banc*, determined in *Diaz v. Gates* (420 F. 3d 897 [2005]) that lost employment is an injury to property interest and that California law protects the legal entitlement to both current and prospective contractual relations:

> "There is similarly no room in the statutory language for an additional amorphous requirement that, for an injury to be to business or property, the business or property interest have been the 'direct target' of the predicate act. The statute is broad, but that is the statute we have. Were the standard as the dissent claims, we would have the anomalous result that one could be liable under RICO for destroying a business if one aimed a bomb at it, but not if one aimed at the business owner, missed and hit the business by accident, or if one aimed at the business owner who happened to be in the business at the time."

IV. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court deny Petitioners' Writ for Certiorari.

DATED: September 5, 2006

By _____
Joseph E. Deems, Attorney for
Respondent Valerija Kachavos

No. 06-195

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Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA and VALERIJA KACHAVOS,

Respondents

PROOF OF SERVICE

I, JOSEPH E. DEEMS, do swear and declare that on this date, September 6, 2006, as required by the United States Supreme Court Rule 19, I have served the enclosed **Respondent's Opposition to Petition for Writ of Certiorari**, on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States Mail Properly Addressed to each of them and with First Class Postage.

The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2006

By _____
Joseph E. Deems, Attorney for
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